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No. 01-865

IN THE

Supreme Court of the United States

NICHOLAS STORTI AND MICHAEL PEREZ,
A MINOR, BY and THROUGH HIS FATHER and
NATURAL GUARDIAN, GEORGE PEREZ,

Petitioners,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION
AUTHORITY and JOHN K. LEARY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the court of appeals correct to affirm the district court's grant of summary judgment where it applied well-established First Amendment principles in upholding as reasonable and content-neutral a transit authority's rule pursuant to which the transit authority permits distribution of noncommercial handbills but regulates the location where this activity may occur by confining it to areas other than the platform areas abutting its train tracks and moving transit vehicles and to areas outside the confined "paid" areas of its stations?

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COUNTER-STATEMENT OF THE CASE

A. Introduction.

Petitioners provide a highly selective and somewhat disorganized account of the proceedings below. A more accurate summary may be found in the district court's opinion at 6a to 12a.

This case involves an unsuccessful First Amendment challenge to a transit station rule adopted by the Southeastern Pennsylvania Transportation Authority ("SEPTA"), which permits access to SEPTA's transit stations for purposes of non-transit-related expressive activities such as leafletting, but regulates where in the stations such activities may occur by prohibiting such activities on subway, regional rail and bus platforms and in paid areas. In the absence of any genuine issue of material fact, the Honorable Thomas P. O'Neill, Jr. of the United States District Court for the Eastern District of Pennsylvania correctly granted summary judgment in favor of SEPTA as a matter of law, holding that SEPTA's written Rules Relating to Constitutionally Protected Activities ("the Rules") restricting leafletting to the larger transit station areas outside (1) "paid" areas and (2) station platforms comports with all applicable First Amendment principles.[1] The Court of Appeals for the Third Circuit (Sloviter, Alito, and Greenberg, Circuit Judges), in an unreported memorandum decision after oral argument, affirmed the decision of the district court holding the SEPTA policy at issue to be "reasonable, nondiscriminatory and not violative of appellants' First Amendment rights." 3a.

As the courts below recognized, this case involves only the application of well-settled First Amendment aspects of the "public forum" doctrine to a particular factual record. Petitioners point to

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1 "Paid areas" are defined in the Rules as "areas of SEPTA property that passengers access after utilizing a fare instrument."

"Platform" is defined in the Rules as "an area of SEPTA property from which passengers board or exit SEPTA transit vehicles and includes sidewalks adjacent to transit bus berths and boarding islands at SEPTA stations and railway and bus platforms immediately adjacent to moving transit vehicles, stub ends of platforms, trackbeds, driveways, or aprons."

no actual conflict among the circuits. Petitioners' main contentions are that the district court and court of appeals misapplied the law to the facts and that both the district court and the court of appeals misunderstood or overlooked certain aspects of their First Amendment challenge. Petitioners are incorrect and in any event present no question that warrants further review by this Court.

B. The Proceedings Below.

1. The District Court Proceedings.

In the district court, petitioners challenged Rule 6(a) of SEPTA's written Rules.[2] Rule 6(a) states:

> No person shall distribute or attempt to distribute such material on any platform or in any paid area or in any restricted area. 10a.

The Rules limit leafletting activities, which are otherwise permitted so long as the leaflets are noncommercial and the activity comports with certain restrictions concerning the safe flow of pedestrian traffic, to the expansive areas outside the "paid" and platform areas of SEPTA stations ("the paid and platform area restriction"). After conceding their Fourteenth Amendment challenge, petitioners contended in the district court that the paid and platform area restriction violated their First Amendment right to freedom of speech.

Based on the largely uncontradicted record presented, which included unrebutted affidavits concerning public safety from a SEPTA police captain and an engineering expert supporting the paid and platform area restriction, the district court rejected this contention. In a Memorandum and Order dated September 10, 1999, the district court held that SEPTA was entitled to summary judgment and denied petitioners' cross-motion for summary judgment.

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2 Petitioners' account of the proceedings below is misleading because the facts recited, some of which do not appear of record at all and most of which were developed in a separate litigation that involved a challenge to SEPTA's policies in effect before implementation of the Rules, primarily relate to the time period *before* January, 1999, when the Rules were implemented.

The district court correctly analyzed the summary judgment motions under this Court's "public forum" decisions.[3] The district court correctly determined that the paid and platform areas at issue were "non-public" fora, *i.e.*, that these areas of the stations had not been intentionally opened up to discourse by SEPTA, and that accordingly SEPTA was free to "impose any restrictions on expression . . . or close them altogether so long as the restrictions are reasonable and viewpoint-neutral." 14a. After a careful review of this Court's First Amendment "public forum" decisions, the district court remarked that despite certain differences among the members of this Court with respect to "public forum" analysis, on the facts of this case, "there would be something close to unanimity on the Supreme Court[.]" 16a.

The district court carefully considered and applied this Court's decision in *International Society of Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (involving a ban on solicitation and leafletting in airport terminals) and noted that the Court had held that the equivalent of SEPTA's "free areas" — namely, the "multipurpose" areas of the airport terminals that included restaurants, coffee shops, book stores, clothing stores, post offices, food stores, barber shops, and newsstands — had not been intentionally opened to expression and therefore were "non-public" fora. The district court noted that the facts of the present case presented a much easier decision than *Lee*. The areas at issue in this case — limited to the platforms and paid areas adjacent to moving transit vehicles — are the areas that are analogous to an airport's "secured airport passenger ways, waiting areas, and jetways" that under *Lee* clearly would be classified as a "non-public" forum. 20a.

With respect to pre-1999 use of the platform areas by a Hare Krishna group pursuant to a 1975 consent decree in an earlier litigation initiated by that group, the district court held that this prior use, which was discontinued upon modification of the 1975 consent decree in 1999 and simultaneous promulgation in 1999 of

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3 The district court also held that the outcome of this case would be the same even without reference to the public forum analysis because the paid and platform area restriction was a reasonable and content-neutral time, place and manner restriction.

SEPTA's written Rules (which in the 1999 Modified Decree the Krishna organization expressly agreed to comply with) did not alter the analysis. Noting that well-established precedent of this Court confirmed that "[w]hether the government has designated a particular place as a public forum" is a "matter of the government's intent and purpose," 17a, and summarizing the record as showing the evidence "undisputed" that SEPTA had "only ever intentionally allowed solicitation and leafletting in the paid areas and platforms by the Krishnas pursuant to the 1975 consent decree, and newspaper sales and a few similar activities on certain occasions in certain stations," the district court held no public forum had been created. 18a.

Alternatively, the district court held that even if the relevant forum were once opened - which it held was not the case on the factual record before it - SEPTA had properly exercised its right to reclaim its property by enacting the written Rules and securing the agreement of the Krishna organization to modify and modifying the 1975 Krishna consent decree to comport with those uniform Rules prohibiting these non-transit-related activities in the paid and platform areas. As this Court's precedents establish, *Cornelius v. NAACP Legal Defense And Educ. Fund*, 473 U.S. 788, 802 - 803 (1985), *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 (1983), and as the district court correctly stated, "the government does not create a public forum by inaction or accident and, once it has created one, may close it." 18a. Applying these well-settled principles to uncontradicted facts, the district court concluded: "If SEPTA ever designated the paid areas or platforms of its stations as public fora (which the record does not support), it has now clearly and effectively revoked that designation." 18a.

The district court next concluded that the paid and platform area restriction was both reasonable and viewpoint-neutral and thus permissible in a non-public forum: "There can be no doubt SEPTA's Rule fulfills both requirements." 18a. "Obviously it is viewpoint-neutral, as any type of distribution of written material is prohibited." 18a. "It is also reasonable." 18a. "SEPTA has articulated and offered evidence to support specific and important

reasons for its view that the platforms and paid areas should be dedicated exclusively to transit use. These include SEPTA's interests in ensuring passenger safety and maintaining unhindered pedestrian traffic flow on the narrow and confined platforms, as well as its more general commercial interests in ensuring the perceived security and comfort of its customers and thus keeping and attracting new transit riders." 18a.

Finally, and in an alternative holding, the district court determined that (i) even if the entirety of the stations were considered to be the relevant forum for First Amendment analysis, and (ii) even if the forum were "public" rather than non-public, the paid and platform area restriction would easily survive First Amendment scrutiny under the "time, place and manner" test articulated by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). For this additional, alternative reason, the district court found that SEPTA's narrow limitation on the place where leafletting might occur does not violate the First Amendment.

2. The Decision Of The Court Of Appeals.

After hearing oral argument on July 12, 2001, by Memorandum Opinion dated July 27, 2001, the court of appeals affirmed, concurring in the district court's conclusions. The court of appeals stated: "After careful review of this matter we find that the ban is reasonable, nondiscriminatory and not violative of appellants' First Amendment rights." 3a. The court of appeals also expressly considered the additional arguments presented on appeal and determined that petitioners' belatedly and inadequately raised additional arguments concerning alleged vagueness, "retaliation," and other issues were not properly before the court of appeals, were not preserved in the district court or, if preserved, had not been presented adequately in the court of appeals or had no merit. 3a.

SUMMARY OF ARGUMENT

Petitioners present no issue worthy of review on a writ of certiorari by this Court. They do not expressly contend there is a conflict among the circuits on any point of law relevant to disposition of this case, and there is none. The circuit court cases

cited by petitioners are wholly consistent with the decision of the courts below. The primary authority relied upon by petitioners, *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993), was easily distinguished by the district court.

Nor is the decision of the courts below inconsistent with any decision of this Court. On the contrary, the courts below carefully and correctly applied this Court's public forum precedents to the facts of this case.

This case involves a routine and correct application of well-established First Amendment public forum principles to a particular factual record. Any difficult or complicated points of law that were raised at all by petitioners in the courts below were raised belatedly or inadequately or were waived.

ARGUMENT

PETITIONERS PRESENT NO ISSUES THAT ARE WORTHY OF CONSIDERATION UPON A WRIT OF CERTIORARI

A. Petitioners Do Not Contend That There Is A Conflict Among The Circuits.

Petitioners do not expressly contend that there is a conflict among the circuits on any point of law involved in this case. Nor could they. This case involves only the application of well-established First Amendment "public forum" precedents of this Court to the unique facts of this case.

Petitioners do cite the decision of the United States Court of Appeals for the First Circuit in *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993), but the Third Circuit's decision below is not in conflict with the First Circuit's decision in that case. *Jews for Jesus* involved application of the public forum doctrine to a very different factual record. In that case, the transit authority permitted and condoned a wide variety of expressive activities throughout its stations — musical entertainment, wandering newspaper hawkers, distribution of promotional flyers — yet simultaneously sought to prohibit

leafletting. The district court in the present case adequately answered this alleged "conflict" when it easily distinguished *Jews for Jesus* and praised SEPTA for "not attempt[ing] to paint a ban with such a broad and blunt brush." 20a.

Nor does the Third Circuit's decision below conflict with the holding of *Chicago Acorn v. Metropolitan Pier and Exposition Authority*, 150 F.3d 695 (7th Cir. 1998), which petitioners cite. There, the Seventh Circuit determined, on a very different factual record that did not even involve transit stations, that the government had not designated the walkways of its property (a renovated navy pier containing recreational and commercial facilities) as public fora for free expression. With respect to proposed leafletting in the indoor mall area walkways, pathways that were "pedestrian walkways leading mainly to shops," 150 F.3d at 703, the Seventh Circuit held that under this Court's decision in *Lee* and consistent with the First Circuit's decision in *Jews for Jesus*, such walkways were areas where leafletting must be permitted. This conclusion is entirely consistent with the decision in this case: SEPTA permits leafletting in the *"multipurpose" public areas* of its stations and only restricts the activity *in the separate "paid" and platform areas of its stations.*

Finally, the decision below involves no conflict with *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990), involving an anti-panhandling restriction. In fact, the Second Circuit in *Young* found that the entirety of the New York City subway system was a *non*-public forum, at least with respect to the category of speech at issue in that case, begging and panhandling, and the Second Circuit upheld the transit authority's ban on begging and panhandling. 903 F.2d at 161-62. Petitioners do not even appear to contend that *Young* conflicts with the decision below. They could not. Petitioners merely point to the regulations of the New York City Transit Authority in *Young* to show that one transit authority may have adopted less restrictive rules with respect to leafletting.[4]

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4 Petitioners make the contention in both their "Questions Presented" and their "Statement of the Case" that no other comparable major transit system has a total platform and paid area ban on leafletting, but this contention is not supported by

Even if true, that consideration supplies no reason why the Court should review the decision below.

This case presents no question on which there is a circuit conflict on the applicable First Amendment public forum principles.

B. The Decision Below Is Not Inconsistent With Any Decision Of This Court.

Petitioners incorrectly suggest that the decision below is inconsistent with decisions of this Court. Thus, they argue that SEPTA engaged in impermissible content or viewpoint discrimination and that the decisions of the courts below contradict this Court's decisions in *Capitol Square Review v. Pinette*, 515 U.S. 760 (1995), *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983). There is no merit to petitioners' contention. There is no conflict upon any relevant point of law. Rather, petitioners merely disagree with the lower court's unanimous application of the well-settled principle that government may not discriminate based on point of view to the particular facts of this case. The courts below correctly determined that SEPTA's Rules permitted no leafletting *by any person or group*, that SEPTA's Rules were consistent and *did not* except the Hare Krishnas in light of the 1999 adoption of the Rules and the accompanying modification of the prior 1975 Krishna consent decree, and therefore that this Court's viewpoint precedents were not offended in any respect.

With respect to the district court's holding that the transit areas at issue constitute non-public fora, the decision below likewise does not depart from this Court's public forum precedents. This Court's decisions in *Perry* and *Cornelius*, as well as *Lee*, were strictly and carefully applied by the district court in this case, which found that the paid and platform areas had not been "intentionally opened up to discourse by the government" – that they "have not traditionally been used for expression and are not now." 18a. Even putting aside

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record evidence in the case and the statement is improperly included in the petition for a writ of certiorari.

the historic use of the property, the district court applied this Court's precedents in *Perry* and *Cornelius* that government is "not required to indefinitely retain the open character of the facility," 460 U.S. at 46, 473 U.S. at 788, and determined that even if SEPTA had ever designated the paid areas or platforms as public fora – something the "record does not support" 18a – "it has now clearly and effectively revoked that designation." 18a.

Finally, even if each of these sound determinations is ignored, the district court alternatively held, applying this Court's precedent in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), that if the paid and platform area restriction were viewed alternatively under the "time, place and manner" test applicable to a public forum, it is proper. 21a – 22a. The paid and platform area restriction is content-neutral, narrowly tailored to serve a significant government interest, and leafletters have ample alternative means for communication throughout the other expansive halls, concourses, corridors and walkways of SEPTA's transit stations. 21a – 22a. The *Ward* time, place and manner test was correctly applied and this alternative holding is also perfectly consistent with the decisions of this Court.

C. This Case Involves A Routine Application Of Well-Established First Amendment Public Forum Principles To A Largely Uncontested Factual Record.

Neither the district court nor the unanimous panel of the court of appeals identified any unsettled law pertinent to disposition of the issues presented in this case. To the extent any complicated legal issues were presented at all to the court of appeals, they involved the doctrine of First Amendment "retaliation," a theory that, if pleaded at all (the term "retaliation" did not appear in petitioners' amended complaint, despite petitioners' unmeritorious contention (Pet. at 6.) that paragraph 22 of their amended complaint (33a) raised it), was inadequately raised before, and not considered by, the district court. Petitioners' briefing of that issue in the court of appeals was so cursory and inadequate that the court of appeals appropriately declined to consider it in the first instance, on both grounds. Moreover, petitioners' entire treatment of "retaliation" in the court of appeals relied upon a single — vacated — district court

decision, *McAfee v. Deale*, 20 F. Supp. 2d 943 (E.D.Va. 1998), *vacated*, 299 F.3d. 1143 (4th Cir. 2000) (table). As the court of appeals noted, the *McAfee* decision involved a particularized claim of retaliatory discrimination, whereas the "retaliation" claim here involves a contention of claimed retaliation against a class of persons. That is, petitioners appeared to contend that the filing of an earlier and different lawsuit by a *different* individual (not even one of the petitioners in this case) — a lawsuit that was settled with those parties' claims released — caused SEPTA to close the relevant forum to all persons (not just the prior plaintiffs and petitioners) and that this closing of property to all somehow may be deemed to constitute constitutionally impermissible "retaliation." These novel and potentially broad-reaching contentions were never amplified and were inadequately presented to the courts below for consideration, but instead were smuggled into the case in the court of appeals when it became clear that the appeal was clearly unmeritorious based on the issues petitioners had actually litigated in the district court. The court of appeals correctly rejected these belated contentions as waived and/or without merit.

Finally, as to petitioners' claim that the courts below wrongly found a "waiver" of certain arguments, petitioners do not contend there is a circuit conflict or other legal uncertainty about the proper standards for a finding of "waiver" of an issue. Rather, again petitioners only contend that there was a misapplication of the well-settled principles of waiver to the particular facts of this case. No overarching issue meriting plenary review by this Court is presented. Moreover, the unanimous court of appeals panel was clearly correct in determining that these issues had been waived.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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